In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 410

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

TRANSAMERICA CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The two contentions made in the brief in opposition are (1) that the question presented by the petition is not of the character specified by the Rules of this Court as appropriate for review by certiorari and (2) that the case is not in a posture appropriate for review.

1. The three grounds advanced in support of the proposition that the question presented by the petition is not of a character appropriate for review are (a) that the decision below is correct, (b) that it is

not in conflict with other applicable decisions, and (c) that since it involved a statute which has been superseded, it is not of general importance. This reply will be confined to the third ground. As our petition dwelt with the merits of the decision below (Pet. 15-21), and we will not repeat the views there stated. As to conflict of decisions, the petition did not give this as a reason for granting review.

Respondent urges (Br. in Opp. 19-21) that, because Section 7 of the Clayton Act was amended in 1950, any interpretation by this Court of the "tendency to monopoly" provisions of the original section would be of doubtful application to proceedings under the amended section. We take issue with this contention. The language of the original section, which prohibits acquisitions where the effect may be to "tend to create a monopoly of any line of commerce," was retained in the revision. The section, as amended, prohibits acquisitions "where in any line of commerce in any section of the country, the effect * * * may be * * * to tend to create a monopoly."[1] The additional phrase "in any section of the country" does not expand the section's scope. The prohibition against stock ac-

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[1] The amended section reads in pertinent part (15 U.S.C. 18):

> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

quisitions which tend to create a monopoly of "any line of commerce," like the corresponding prohibition against monopolization of "any part" of interstate commerce in Section 2 of the Sherman Act, clearly has both distributive and geographical application.

Nor does the legislative history of the 1950 amendment show any purpose to change the "tendency to monopoly" portion of Section 7. Respondent quotes (Br. in Opp. 20) a statement by the Senate Judiciary Committee that the changes which were being made were designed to "assure a broader construction of the more fundamental provisions that are retained." This statement has specific reference to changes other than the section's "tendency to monopoly" provisions. The Committee report pointed out that Section 7 had prohibited acquisitions where the effect may be to substantially lessen competition between the acquiring and the acquired corporation, or to restrain commerce in any "community." The Senate Committee believed that the "excessive sweep" of these provisions had been "largely responsible for the tendency of the courts in cases under that section to revert to the Sherman Act test." By elimination of these provisions,[2] which the Committee said "appear to reach situations of little economic significance," it was the legislative purpose to assure

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[2] In lieu of the eliminated effect clauses, the amended section makes unlawful acquisitions where the effect may be "substantially to lessen competition" in any "line of commerce" in any "section" of the country.

a broader construction of the section's more fundamental provisions. S. Rep. 1775, 81st Cong., 2nd Sess., p. 4.

The second statement from the Senate Committee report which respondent quotes (Br. in Opp. 21) relates solely to the question whether the amended section would prevent acquisition of stock or assets of companies in a failing or bankrupt condition. The Committeee stated its belief that the amendment would make no change in the "judicial interpretation [of Section 7] on this point" in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291. S. Rep. 1775, *supra,* p. 7.

2. Respondent urges that the case is not in a posture appropriate for review, upon three grounds: (a) that, if review is granted, respondent would present to this Court numerous contentions not passed upon by the court below, (b) that the Board's report does not set forth the grounds of its decision with sufficient clarity, and (c) that, if this Court reverses the decision below, the case would have to be remanded to the Board for reconsideration.

The first and second grounds require, we believe, little reply. This Court need not consider questions not passed on below, but may, if it reverses on the point presented by the petition, remand for consideration of the other issues. We additionally note, as to the second ground, that respondent did not urge in the court below that the Board's report does not disclose its *ratio decidendi* with sufficient explicitness (R. 10061-6).

The substance of respondent's third ground is that even if the court below adopted an erroneous construction of the statute, this Court should not grant review because, notwithstanding reversal of the decision below, further administrative proceedings will be necessary. Respondent asserts that in these circumstances any decision rendered by this Court would be "academic and purely advisory" (Br. in Opp. 26-27). But when, as here, review is sought of a ruling "fundamental to the further conduct of the case," the decision on review plainly is not "academic," and writ of certiorari properly should be granted (see Pet. 22).

Furthermore, it is by no means clear that, because of events occurring since entry of the Board's order, further administrative proceedings will be necessary. Respondent suggests that the sale of its remaining holdings of Bank of America stock, elimination of interlocking directors of the two companies, the death of L. M. Giannini, and installation by respondent of a new president and chairman of its board [3] "have completely changed the picture as the Board saw it or could reasonably contemplate it at the time it issued its Decision" (Br. in Opp. 26). However, respondent's sale of its remaining

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[3] The new president and chairman is F. N. Belgrano, Jr. (Commercial and Financial Chronicle, 6/15/53, p. 10). This new top executive has occupied important positions in the Transamerica system for at least 20 years. He is a past vice-president of Bank of America, a one time member of an Advisory Council which had the duty of determining "management policies for the entire group of Transamerica's banks," and he has also been president of various Transamerica banking and non-banking subsidiaries (R. 372, 380).

Bank of America stock is not, in reality, a new factor. The Board did not base its finding of control of Bank of America on the percentage of stock of this bank then owned by respondent, but on a detailed analysis of the long and intimate affiliation of the two companies (R. 372-82).

Contrary to respondent's contention, the Board anticipated the possibility that Transamerica might dispose of the remainder of its Bank of America stock, and expressly found that control would continue even if Transamerica were to divest all of that stock (R. 399-400). The Board summarized its conclusion on this aspect of the case as follows (R. 399):

> The long and close association of Bank of America in aiding in constructing the Transamerica group, the unity established over the years, the personal associations and relationships among important officials in Transamerica and Bank of America, and similar intangible factors, provide sound reason to believe that even if Transamerica were required to divest itself of the stock it now holds in Bank of America, the existing relationship between Transamerica and Bank of America would continue.

Respondent also contends (Br. in Opp. 15) that the case will have to be remanded to the Board for the taking of additional evidence, because the Board erroneously excluded evidence as to the competitive effect of respondent's stock acquisitions. But the excluded evidence related to the alleged "absence

of any tendency to monopoly in various individual communities" in which particular acquisitions took place (Br. in Opp. 12; see also 6-7). Whether or not such evidence was properly excluded turns on the basic question which the petition presents, whether the Board may base a finding of tendency to monopoly on the cumulative effect of a large number of acquisitions in the five-state area in which its banking subsidiaries operate, without determining the local competitive effect of specific acquisitions.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

NOVEMBER, 1953.